United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Original - Appendix and Briefs 74-1664

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1664

RAYMOND ARGRO,

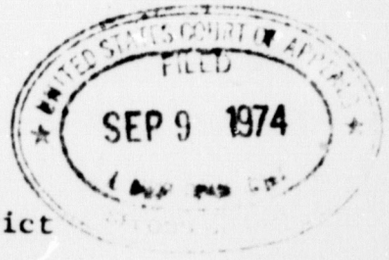
Appellee,

v.

UNITED STATES OF AMERICA,

Appellant.

B.P/S



Appeal from the United States
District Court for the Eastern District
of New York

(John F. Dooling, Jr., Judge)

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This brief responds to erroneous legal and factual arguments made by appellee.

I.

THE POSSIBILITY OF REVERSAL OF AN INTERVENING CONVICTION DOES NOT VITIATE THE PROPRIETY OF A PROMPT, INSTITUTIONAL REVOCATION HEARING.

Since the filing of the government's brief appellee Argro's state conviction has been affirmed by the New York Appellate Division. (Appellee's Brief, at 19) Argro now contends that the Board of Parole is still not entitled to rely upon his state conviction in an institutional revocation

hearing, but must await the outcome of his case in the New York Court of Appeals. (Appellee's Brief, at 23) Following an affirmance by the State's highest court, Argro would presumably argue that the Board must similarly await the disposition of his petition for certiorari to the Supreme Court. Such reasoning vividly illustrates the illogic of the opinion below.

Since the submission of the government's brief, this Court decided Roberson v. Connecticut, No. 74-1072 (July 31, 1974), wherein, it held that probation may be revoked on the basis of an intervening conviction despite the pendency of a state appeal. In Roberson, the plaintiff argued that "'although probation can be revoked without a conviction, or on a conviction alone, once an appeal is taken, the equation is drastically changed, and the Constitution prohibits revocation before the probationer's direct appellate rights are exhausted.'" (Slip opinion at 5081-82, citing Roberson Brief, at 14.) As in Roberson, Argro's case "has a superficial appeal." (Slip opinion, at 5082) It will not, however, withstand closer analysis, although, unlike Roberson, Argro admittedly does not claim an absolute right to delay of revocation proceedings pending appeal of an intervening conviction. Rather, appellee contends that the Board must

grant a local hearing whenever an intervening conviction, which would presumably serve as the principal basis for revocation, is on appeal.

The pitfalls of requiring Board compliance with the district court's order are arguably as pernicious as those alluded to by the Court in Roberson. In 1973, the Board conducted some 2,000 revocation hearings; approximately 100 of these were held locally. Requiring the Board to vastly increase the number of local hearings would, therefore, be extremely burdensome.[1/] More importantly, the procedure laid down by the district court is unsound from a policy standpoint because it implicitly suggests that the parolee may have an opportunity to relitigate issues decided adversely in his criminal trial. The Supreme Court has held that this is not the case. Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

[1/] The district court assumed that "local parole hearings would not appear of necessity to impose any administrative burden" when held in a large metropolitan area such as New York City. (Appendix, at 54) Assuming numerous federal parole revocations do originate in New York City, the Board could hardly permit local hearings for those convicted of intervening offenses while living in a city such as New York without granting a similar opportunity to a parole violator whose offense occurred in, e.g., an obscure area of the Southwest.

In arguing the importance of the dispositional aspect of the revocation hearing, Argro cites several cases for the proposition that, despite an intervening conviction and sentence, revocation proceedings must be held promptly to insure that mitigating circumstances and rehabilitative potential are considered. (Appellee's Brief, at 31-34) He fails to point out, however, the distinction between, e.g., Jones v. Johnston et al., 368 F.Supp. 571 (D. D.C. 1974) and the case sub judice.

In Jones and Fitzgerald et al. v. Sigler et al., 372 F.Supp. 889 (D. D.C. 1974) the court opined that a former parolee's ability to mitigate would be unconstitutionally infringed by a lengthy delay pending service of an intervening sentence.[2/] Argro argues, in effect, that venue is no less important than time and that, more significantly, the quantitative and qualitative ability of a parolee to mitigate presents a constitutional question. Appellant disagrees with both the reasoning of Jones and Fitzgerald and the constitutional conclusions urged by appellee, particularly in light of the

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[2/] See also Cleveland v. Ciccone, No. 74 CV 131-X-WHB; Whittaker v. Ciccone, No. 74 CV 153-S; Beshers v. Ciccone, No. 74 CV 207-S-WHB-R (W.D. Mo., May 14, 1974)(consolidated detainer cases; notice of appeal filed by government May 24, 1974); but see Trimmings v. Henderson, No. 73-3978 (5th Cir., July 31, 1974) (following Cook, infra.)

fact that review in all of these cases was undertaken prior to the revocation hearing itself.[3/]

In a more recent consideration of the detainer issue the Tenth Circuit unequivocally followed the Fifth Circuit's decision in Cook v. Attorney General, 488 F.2d 667 (1974) (Appellant's Brief at 9-10). In Small v. Britton, No. 73-1483 (July 30, 1974) the Tenth Circuit recognized the parolee petitioner's contention that he was injured by the Parole Board's failure to allow him a timely opportunity to present mitigating circumstances. The court, however, was unimpressed with this rhetoric in view of the parolee's complete failure to:

> enlighten the Court as to what facts and/or circumstances he would have presented in 'mitigation' had he been given the earlier opportunity to do so. (Slip opn., at 6)

The court in Small found that the parolee's asserted due process deprivation was simply conjectural:

> [H]e [petitioner] has failed to display how the challenged delay prejudiced his ability to present the unexplained 'mitigating' evidence or denied him due process. (Id.)

In Appellee's Brief, at 36, he states:

> What is more, in this case the appellee demonstrated that he could present mitigating circumstances with respect to each alleged violation.

[3/] The prematurity issue is further discussed, infra.

Apparently the circumstances referred to include, among other things, that appellee held a job (Appellee's brief, at 16), was supporting his children (Id.), and was engaged in a "genuine and mature" relationship with another individual (Id.). Appellant fails to see how these assertions distinguish Argro from Small; nor is it clear why such mitigating factors could not be raised at an institutional hearing. Appellant submits that the remedy constructed by the district court might be appropriate in the event that he could demonstrate, after a hearing, that some constitutional deficiency resulted from the lack of local venue. These are not the facts of the case sub judice, however, and the relief granted by the court below was, therefore, clearly premature.

II.

PETITIONER FAILED TO DEMONSTRATE FACTS JUSTIFYING BAIL

As the government stressed at the hearing conducted on this matter, the case was originally before the court as an application for bail. In that context, appellant maintains that the district court was without jurisdiction to admit Argro to bail. (See Appellant's Brief, at 11-14.)

Apparently the court liberally construed Argro's application be a petition for a writ of habeas corpus and

admitted the prisoner to bail pursuant to its inherent habeas powers. See Johnston v. Marsh, 227 F.2d 528 (3d Cir. 1955). The government does not argue that a district court lacks the authority to grant bail in a properly brought proceeding; rather, it contends that this proceeding, having occurred prior to any substantive action by the Board, was premature and thus improper.

Since the government filed its opening brief the Fifth Circuit has had the opportunity to consider the relatively obscure issue of bail in the context of habeas corpus. In Calley v. Callaway, 496 F.2d 701 (5th Cir. 1974), the court adopted the reasoning laid out in the government's opening brief at 16-20. That is, the court held that the allegations made by the prisoner and the circumstances revealed by the record did not justify bail pending determination of the merits of the petition. Appellee argues that the cases support the granting of bail upon a finding of a constitutional deprivation. As previously stated, the government concurs. But it is submitted that Argro bears a closer resemblance to Calley than to, e.g., United States ex rel. Collins v. Claudy, 204 F.2d 624 (3d Cir.), cert. denied, 343 U.S. 954 (1953) (cited by appellee). Indeed, Calley arguably had a far stronger case for bail than Argro since he presented the

district court with a bonafide habeas petition attacking his military conviction on numerous constitutional grounds. Unlike the military in Calley, the Board of Parole has taken no action with respect to Argro warranting habeas relief; hence, the action of the court below was premature and bail was and continues to be inappropriate.

CONCLUSION

For the reasons stated above and in appellant's opening brief, appellant respectfully requests that this Court reverse the holding of the court below and return the appellee to the custody of the United States Board of Parole.

Dated:

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 3rd day of September 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~two copies of~~ 1 cy Appellant's Reply Brief of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
606 United States Courthouse
Foley Square
New York, New York 10007

Sworn to before me this
3rd day of September 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19 75

Deborah J. Amundsen
DEBORAH J. AMUNDSEN